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January 24, 2000

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Mr. Harry M. Scheuller, Chief
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 P. O. Box 2000
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Re: Comments to Petition for Temporary Urgency Permit Change

Dear Ms. Struebing, Ms. Erickson, and Mr. Schueller:

South Delta Water Agency objects to and submits the following comments to the USBR's request for a Temporary Urgency Change to its Export Permits.

It is very clear that the USBR has little regard for any interests other than itself. It is less clear why DWR chooses to help the Bureau further harm third party interests. It is disappointing that the SWRCB turns a blind eye to the Bureau's harm to environmental interests and superior water right holders.

The subject Petition can be summed up as follows:

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- (i) Operation of the CVP and to a lesser extent the SWP are currently each day lowering water levels in the South Delta to the point where local riparian and senior appropriators are unable to exercise their water rights;
- (ii) In order to maximize the water available to junior right holders, additional water will be taken from the South Delta channels; and
- (iii) Public agencies constituted to protect fish and wildlife and other public trust needs condone the exports even though numerous areas of South Delta channels are currently going dry each day.

I. A. The Petition should be denied as it is now moot. The Petition seeks to add the SWP Banks Pumping Plant as a point of diversion for the CVP. D-1641, adopted on December 29, 1999, added the SW pumps as a point of diversion for the CVP. That Decision/Order added conditions to such joint point use. If the Bureau does not want to follow such conditions, it must file a Petition for Reconsideration of the Decision rather than seek a temporary change to avoid those conditions. The subject Petition is a ruse to avoid the existing legal limitations on such joint point use set forth in D-1641.

Page 151 of D-1641 requires that before joint point operations can be used, the USBR must develop a response plan "to ensure that water levels in the south Delta will not be lowered to the injury of water users in the southern Delta." The plan must be prepared with input from SDWA and approved by the Executive Director of the SWRCB. No such plan has been discussed, proposed, or adopted.

The previous Response Plan used under WR 98-9 places conditions on the joint point use which are not satisfied under the existing Petition. The Draft Initial Study/Negative Declaration makes no mention of those conditions except to say that joint point pumping will be done in compliance with that old plan. That plan provided generally, that when South Delta water levels were adequate and not adversely affected by joint point, increased pumping could occur at the SWP pumps. The old plan specifies that water levels must be above minus 3/10ths of one foot mean sea level in order for such pumping to occur. If they are not above that level, or if South Delta diverters are experiencing problems, joint point pumping cannot proceed. Instead of analyzing this, the Initial Study models incremental effects due to the proposed joint point pumping and concludes that they will be up to 0.03 feet or less. It is curious that the modeling supporting the Negative Declaration does not compare mean sea level elevation with modeled low water levels, and was not provided to SDWA for review.

The reason the old response plan is inadequate and cannot be a substitute for current D-1614 requirements is that for nearly three months now, South Delta diverters have experienced

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levels so low that at some times they cannot divert water. The actual levels at which diverters experience difficulty must now be re-examined in order to protect those interests. Based on an initial review, the minus 3/10ths of one foot may now be unacceptable.

B. D-1641 also requires that joint point pumping be done within 12 months of the export reductions. The Bureau's "make-up" pumping in July, August and September appear to be outside of last spring's "lost" exports. We can therefore see that in order to avoid this limitation on joint point pumping, the Bureau has sought this Temporary Urgency Change.

C. D-1641 also requires that stage one joint point pumping be conditioned upon "all other provisions of the ... permits" being met. The SWP and CVP permits now require them to meet all four southern Delta salinity objectives. The Bureau should provide an analysis that shows whether or not those objectives will be met at all times during this water year as a prerequisite to consideration of the Petition. There is no reason to allow increased benefit under the export permits if water quality violations are anticipated under those or other permits.

For the above reasons, the USBR's Petition should be denied as it seeks to avoid the current joint point limitations adopted in D-1641.

II. The USBR's need is not "urgent" under the statute. Section 1435(c) defines urgent as the proposed temporary change being necessary to "further the constitutional policy that the water resources of the state be put to beneficial use to the fullest extent of which they are capable and that waste of water be prevented." Absent the additional pumping, the water would remain in the channels of the Delta and be used by local riparian and senior appropriators, provide water for fish and wildlife, help dilute elevated salinity levels caused by recent CALFED operational decisions, contribute to Delta outflow, and provide for other public trust needs. None of these listed uses are wasteful. It is difficult to imagine that exporting the water is necessary to further the constitutional policy of the State when the above listed uses are superior to the proposed export use. As previously described, the urgent need of the Bureau is to maximize water availability to junior holders while at the same time depriving senior right holders of that same water.

III. In a letter dated January 14, 2000, the SDWA has recently (again) notified the Board, the Bureau, and DWR that existing levels of pumping are depriving riparian and senior appropriators of sufficient water depth for diversions and thus causing harm to them. That letter included copies of photographs showing South Delta channels being dry or having less than two inches of water in them. In light of this, any additional pumping necessarily injures "other lawful users" of water, and "unreasonably affects fish, wildlife, or other instream beneficial uses." Besides the obvious injury to agricultural diverters, empty channels preclude fish and aquatic wildlife use, as well as recreational boat traffic.

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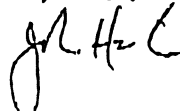
In addition, Water Code § 12204 specifies that, "In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of §§ 12202 and 12203 of this chapter." Sections 12202 and 12203 provide that it is the function of the SWP and the CVP to insure that there is an adequate water quantity and quality in the South Delta to support in-Delta uses. At a time when local in-Delta users are being deprived of the water necessary to exercise their rights, there is by definition no surplus water to divert for export needs. The Petition states that the ability to export the additional water is based on the assumption of there being available excess flows. Since such an assumption is clearly wrong at this time, it is impossible for the Board to find that granting the Petition is in the public interest.

IV. The Petition should be denied unless the USBR indicates that the lost exports are above and beyond the 800,000 acre-feet of yield it is statutorily required to dedicate to fish and wildlife purposes. CVP requires that the Bureau dedicate 800,000 acre-feet of its yield for fish and wildlife purposes. "Lost" exports are a measure of lost yield. If the Bureau has not yet delineated the 800,000 acre-feet for the water years in which the losses sought to be made up occurred, the Petition should not be granted. There is no urgent need, or in fact any need to make up water which Congress ordered be used for fish and wildlife purposes rather than export deliveries.

For the above reasons, SDWA believes that a Petition for a Temporary Urgency Change cannot be granted by the Board. Not only will the Petition adversely affect other legal users of water and adversely affect fish and wildlife and other instream uses, it appears to be an attempt to go around the recently adopted requirements for joint point use. Therefore, SDWA opposes granting of the Petition. We have also been authorized to state that Central Delta Water Agency joins in this objection.

Please call me if you have any questions or comments.

Very truly yours,



JOHN HERRICK

JH/dd

cc: Dante J. Nomellini, Esq.
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